

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Infrastructure
Sharing Provisions in the
Telecommunications Act of 1996

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CC Docket No. 96-23

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REPLY COMMENTS OF
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SUMMARY

To preserve the competitive promise of the Telecommunications Act of 1996, the Commission must adopt rules to ensure that Section 259 does not become a mechanism for deterring or disadvantaging new entrants in local telephone markets. In their comments, the incumbent local exchange carriers (ILECs) stress the putatively exclusive nature of Section 259 agreements and the purported insulation of infrastructure sharing arrangements from the pricing standards of Section 252. Their emphasis on exclusivity and discriminatory pricing reveals their intention to use Section 259 to enable neighboring ILECs to enter into special agreements with one another under rates, terms and conditions that would be otherwise unavailable to competitive local exchange carriers (CLECs) competing in the incumbents' markets. Accordingly, the Commission must implement Section 259 in a manner that accords with the Act's competitive purposes and provisions, and adopt safeguards that address and eliminate the potential anti-competitive effects of infrastructure sharing agreements.

The Commission also should adopt specific eligibility requirements to ensure that only small, rural telephone companies qualify to obtain network features and functions pursuant to Section 259 agreements. The size threshold should be measured at the holding company level, and not at the carrier level. The absence of such size limitations would impose severe administrative burdens on the Commission, contravene Congressional intent, and exacerbate the potential anti-competitive effects of Section 259.

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**REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits these reply comments in the above-captioned proceeding.^{1/}

I. THE COMMISSION'S RULES MUST ENSURE THAT SECTION 259 DOES NOT BECOME A MEANS BY WHICH ILECs THWART ATTAINMENT OF THE ACT'S PRO-COMPETITIVE OBJECTIVES

In its initial comments, NCTA stressed the need for rules to ensure that Section 259 does not become a mechanism that enables incumbent local exchange carriers (ILECs) to block fulfillment of the core local competition objective set forth in the Telecommunications Act of 1996 ("1996 Act").^{2/} The comments submitted by ILECs in this proceeding underscore the importance of adopting such rules. The ILECs, both those that anticipate serving principally as providing local exchange carriers (PLECs) of infrastructure and those that expect to be qualifying local exchange carriers (QLECs), view Section 259 as divorced from the Act's competitive provisions and purposes. Pacific Telesis, a likely PLEC, asserts that under Section 259, "concerns about anticompetitive behavior by incumbent LECs are absent and should not

^{1/} Notice of Proposed Rulemaking, CC Docket No. 96-237 (rel. November 22, 1996).

^{2/} See generally NCTA Comments at 2-7.

influence the definition of LEC obligations."^{3/} The United States Telephone Association, whose members anticipate being both PLECs and QLECs, states that "the provisions of Section 259 stand on their own and have no relationship with Section 251."^{4/}

The Commission should reject the ILECs' effort to insulate Section 259 from the overall competitive design of the 1996 Act. Congress specifically included Section 259 in new Part II of Title II of the Communications Act, which is entitled "Development of Competitive Markets." Neither the language of the Act nor its legislative history supports the ILECs' view that Section 259 stands apart from the Act's competitive purposes.^{5/} Accordingly, the Commission's rules should reflect its previously-stated view that Section 259 is "a limited and discrete provision" that must be implemented "in the context of the pro-competitive goals and provisions of the 1996 Act."^{6/}

^{3/} Pacific Telesis Comments at 5. See also BellSouth Comments at 4 ("while Section 259 should not be implemented in a manner that necessarily interferes with the pro-competitive objectives of other provisions of the Act, neither should it be implemented as if competition were its primary purpose").

^{4/} USTA Comments at 7. See also Rural Telephone Coalition (RTC) Comments at 2 ("To surrender the design of [Section 259] to the Commission's rules on interconnection, which are intended for a completely different purpose -- *i.e.*, the development of competition -- would flout the intent of Congress"); id. at 5 ("Congress included Section 259 specifically to create and preserve opportunities for qualifying carriers *outside* the competitive framework of the Act") (emphasis in original).

^{5/} The weakness of the ILECs' position is highlighted by their misplaced reliance on one predecessor bill, H.R. 3636, that was never enacted by the Senate, and on another bill, S. 2810, that was never even considered by either chamber. See e.g. GTE Comments at 8; Pacific Telesis Comments at 2-3; USTA Comments at 2, n.2; Rural Telephone Coalition Comments at 14. These citations to bills that were never enacted are entitled to no weight.

^{6/} In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. August 8, 1996) at ¶ 169.

Unless the rules adopted under Section 259 are conformed to the requirements of Section 251, the ILECs will attempt to use infrastructure sharing agreements in ways that would thwart competition in both providing carrier and qualifying carrier markets. GTE, for example, stresses that, "[m]ost importantly, the Section 252 pricing standards referenced in Section 251 are irrelevant to Section 259."^{7/} Meanwhile, USTA emphasizes that "[m]ost important, unlike Section 251, any arrangement entered into under Section 259 can be exclusive."^{8/} The Rural Telephone Coalition (RTC) echoes both these views, citing both the putatively exclusive nature of Section 259 agreements and their purported insulation from the pricing standards of Section 252.^{9/}

The ILECs' accent on exclusivity and discriminatory pricing, as well as their call for the Commission to adopt only minimal guidelines under Section 259,^{10/} evince their intention to use Section 259 to enable non-competing incumbent carriers in adjacent markets to enter into special infrastructure sharing agreements with one another under rates, terms and conditions that would be unavailable to competitive local exchange carriers (CLECs) in the incumbents' home markets. Under the broad, anti-competitive reading of Section 259 proffered by the ILECs, there is nothing to prevent a PLEC from providing a particular network capability to a neighboring QLEC under exclusive rates, terms and conditions in exchange, for instance, for

^{7/} GTE Comments at 9.

^{8/} USTA Comments at 7.

^{9/} RTC Comments at 5 ("under Section 259, providing LECs cannot be required to offer the terms of infrastructure sharing agreements on a common carrier basis and the rates established are not subject to Section 252 pricing standards for arbitration").

^{10/} See e.g. GTE Comments at 13 ("Commission should only adopt very broad rules"); Pacific Telesis Comments at 6-7.

special transport and termination rates. The QLEC would receive a network capability under rates and terms that would be otherwise unavailable to a CLEC, while the PLEC would receive favorable transport and termination rates that would facilitate its provision of extended area service (EAS) covering the QLEC territory. The result would be to stifle competition in both PLEC and QLEC markets.

The RTC seeks to further broaden the anti-competitive potential of Section 259 by applying it retroactively to pre-Act interconnection agreements between non-competing incumbents.^{11/} Such pre-Act agreements cannot, however, be encompassed within Section 259, since they manifestly could not have been entered into pursuant to a statutory provision that Congress had not yet adopted.^{12/} By contrast, both the express language of the Act and the Commission's rules require that pre-Act interconnection agreements between neighboring incumbents be filed and approved pursuant to Section 252(a).^{13/} The RTC's argument must be rejected, since it is a transparent attempt to use Section 259 to prevent CLECs from obtaining interconnection and unbundled elements under demonstrably feasible and reasonable rates, terms and conditions.^{14/}

Several ILECs also interpret Section 259(b)(6) in ways that would undermine competition in both PLEC and QLEC markets. USTA suggests that "infrastructure acquired from other

^{11/} RTC Comments at 13-14.

^{12/} See 47 U.S.C. § 259(b)(7) (specifying filing requirements for agreements entered into "under this section"); Notice at ¶ 28.

^{13/} 47 U.S.C. § 252(a); Local Competition Order at ¶¶ 169-71. See also Notice at ¶ 28.

^{14/} See NCTA Comments at 6-7 and notes 21-24.

carriers is not within the scope of the network facilities required to be provided under Section 251 - Section 251 only obligates LECs to provide access to their own facilities."^{15/} The Commission should clearly and unequivocally reject this position, since, as demonstrated in NCTA's initial comments, its adoption would severely injure competition in QLEC markets.^{16/} Features and functions obtained by a QLEC under Section 259 must be made available to CLECs competing in that QLEC's market pursuant to Section 251.^{17/} Otherwise, infrastructure sharing agreements will become a vehicle for distorting competition in small and rural markets.

USTA's approach, if implemented, also would jeopardize competition in PLEC markets. USTA urges the Commission to declare "that services or facilities obtained by a QLEC pursuant to Section 259 are not available under Section 251 for purposes of competing against the providing PLEC."^{18/} Read literally, this proposal is breathtakingly anti-competitive in its scope, since it would enable a PLEC to vitiate Section 251 by withholding from all CLECs any network capabilities or interconnection services that are also provided to a QLEC under Section 259.^{19/} Clearly, the Act prohibits such a result.

^{15/} USTA Comments at 17.

^{16/} NCTA Comments at 3-6.

^{17/} Indeed, in the paragraph preceding its assertion that network capabilities obtained by a QLEC under Section 259 need not be made available to CLECs, USTA appears to recognize that such capabilities would have to be offered to CLECs. USTA Comments at 16-17 ("For example, where the qualifying carrier obtains infrastructure under Section 259, develops and offers services, neither the QLEC or any carrier obtaining services or functions which utilized the shared infrastructure from the QLEC should be able to use the providing carrier's infrastructure to compete in the PLEC's service area") (emphasis in original).

^{18/} USTA Comments at 17.

^{19/} The potential breadth of USTA's formulation, and its anti-competitive impact, underline the need to carefully and narrowly craft rules adopted under Section 259(b)(6).

Even a narrower reading of USTA's proposal, under which a QLEC (or any CLEC utilizing shared infrastructure obtained by that QLEC) would be prohibited from utilizing capabilities obtained under Section 259 to compete against the PLEC,^{20/} yields results that could undermine competition. If USTA's intent is to permit PLECs to terminate altogether the provision of network capabilities to QLECs that begin to compete against them, its proposal is anti-competitive.^{21/} To prevent such an outcome, the Commission should adopt the proposals proffered by MCI and ALTS which seek to safeguard competition in PLEC markets,^{22/} in addition to the proposals offered by NCTA that seek to ensure that Section 259 does not impede

^{20/} Cf. USTA Comments at 16-17 ("Incumbent LECs should not be required to provide infrastructure under Section 259 in a manner which effectively results in the infrastructure being used to compete against the providing LEC). See also Pacific Telesis Comments at 12; NYNEX Comments at 8; US West Comments at 10.

^{21/} At least one ILEC, Ameritech, recognizes that even though competitors may not obtain network capabilities from PLECs pursuant to Section 259, that does not preclude them from obtaining the same capabilities under Section 251. See Ameritech Comments at 9 ("the infrastructure that need not be shared with competitors includes everything within the scope of Section 259. This is particularly true since in most cases . . . if the QLEC is disqualified from sharing under Section 259 by reason of competition, the same QLEC as a competitor may be entitled to equivalent capabilities under Section 251").

^{22/} ALTS Comments at 3 ("any qualifying carrier that chooses to use Section 259 infrastructure sharing agreements to compete outside its serving area (including competing in the serving area of the provisioning incumbent) would be free to do so, provided that the price it pays for using the facilities or services outside its own universal serving area is governed by Section 251"); *id.* at 4, 7; MCI Comments at 11 ("if a LEC that has a 259 agreement with an incumbent LEC enters the service territory of the incumbent, it should be required to bring the terms of its agreement into alignment with the terms of a 251 agreement").

competition in QLEC markets.^{23/} Thus, QLECs obtaining network capabilities and services under Section 259 who subsequently begin to compete against the PLEC should be permitted to continue to use those capabilities and services, so long as the price, terms and conditions under which they are provided to the QLEC meet the requirements of Section 251.^{24/}

II. THE COMMISSION SHOULD SPECIFY THAT ONLY SMALL, RURAL TELEPHONE COMPANIES ARE ELIGIBLE TO BE QLECs

Several ILECs argue that the Commission should not impose any size limitations with respect to a telephone company's eligibility to obtain network features and functions under Section 259.^{25/} They advocate a case-by-case evaluation of QLEC eligibility, claiming that carriers may lack economies of scale or scope for particular facilities or services.^{26/} In

^{23/} In addition to its proposal that a QLEC obtaining network capabilities under Section 259 should be required to make those capabilities available to CLECs competing within its market, see supra at 5, NCTA also proposed that the scope of the network capabilities that can be made available to QLECs under Section 259 should be no broader the scope of interconnection services and network elements that are available to CLECs under Section 251.

^{24/} See id. Adoption of this proposal also would ensure that PLECs could not evade their obligation under the Act to provide competitors with interconnection and access to unbundled elements by expanding their service area into a market in which a CLEC is utilizing shared infrastructure obtained by a QLEC from that PLEC. Cf. US West Comments at 5-6 (stating that the prohibition against QLECs using Section 259 capabilities to compete against a PLEC would apply in instances in which the PLEC expands into the QLEC's service area).

^{25/} See e.g. Pacific Telesis Comments at 16; USTA Comments at 8. But see NYNEX Comments at 20 ("FCC should interpret the Section 259(d)(2) definition of qualifying carrier in a way that primarily embraces small, rural ILECs"). NYNEX also argues that only carriers designated as ILECs are eligible to be "qualifying carriers" under the Act. Id. Nothing in the statute supports this limitation.

^{26/} See e.g. Pacific Telesis Comments at 16; GTE Comments at 10; USTA Comments at 8.

addition, the ILECs argue that, to the extent any size limitation is adopted, it should be measured at the carrier, rather than holding company level.

Congress plainly did not intend for carriers as large as the BOCs or GTE to be eligible to obtain infrastructure from other carriers under Section 259. To conclude otherwise would effectively ignore the "economies of scale or scope" eligibility requirement set forth in Section 259(d)(1)^{27/} and contravene the Act's legislative history.^{28/} In addition, the case-by-case approach proposed by the ILECs would place severe and undue administrative burdens on the Commission, without serving any countervailing statutory or public policy purpose.^{29/}

Moreover, the failure to adopt a size limitation would undermine the Act's competitive purposes. GTE states that the Commission "should allow carriers to demonstrate that they are unable to bring desired services because they lack a sufficient customer base in a specific geographic location or service area."^{30/} Under this proposal, large neighboring ILECs could seek to band together under Section 259 to jointly deploy network capabilities designed to facilitate the offering of new services which do not yet have any customer base. The approval of such arrangements could potentially shield those network capabilities from CLECs,

^{27/} 47 U.S.C. § 259(d)(1).

^{28/} See 142 Cong. Rec. S717 (daily ed. February 1, 1996) (statement of Sen. Hollings) ("We protected the rural areas The infrastructure sharing is provided for from the regional Bell operating companies to help them sustain").

^{29/} Cf. AT&T Comments at 3.

^{30/} GTE Comments at 10.

particularly if the ILECs prevail in their view that features and functions provided pursuant to Section 259 can be withheld from competitors.^{31/}

The Commission should adhere to Congressional intent and limit QLEC eligibility to small, rural telephone companies.^{32/} Any definition of "qualifying carrier" that includes carriers that are affiliated with large telephone companies or carriers that serve a majority of access lines in a particular state would contravene the Act and undermine competition.^{33/}

^{31/} Cf. USTA Comments at 17.

^{32/} NCTA Comments at 1-3. AT&T Comments at 4-5 (limiting QLEC eligibility to carriers that meet the Act's rural telephone company definition and urging that "the determination of rural telephone company status [be] applied at the holding company level for purposes of Section 259(d) qualification").


^{33/} The Commission also should reject arguments that its jurisdiction is limited under Section 259 only to those network capabilities used to provide interstate services. USTA Comments at 9-12; GTE Comments at 12; Oregon Public Utility Commission Comments at 3-4. Nothing in Section 2(b) limits the Commission's jurisdiction with respect to the implementation of Section 259. Cf. US West Comments at 12-13 (Commission has "full authority over all elements of such sharing under the Act"). The Commission was granted plenary jurisdiction over infrastructure sharing when Congress authorized it to "prescribe regulations that require incumbent local exchange carriers" to make network features and functions available to a "qualifying carrier," which the Act defines as a provider of telephone exchange service, exchange access, and any other service that is included in universal service." 47 U.S.C. § 259(a); id. § 259(d)(1) (emphases added).

CONCLUSION

For the foregoing reasons, the Commission should reject the ILEC infrastructure sharing proposals discussed herein, and implement Section 259 in conformity with the arguments set forth herein and in NCTA's comments.

Respectfully submitted,

THE NATIONAL CABLE TELEVISION
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A handwritten signature in dark ink, appearing to read "Daniel L. Brenner", followed by a horizontal line and the initials "HS".

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CERTIFICATE OF SERVICE

I, Christopher J. Harvie, do hereby certify that a copy of the foregoing Reply Comments of The National Cable Television Association was hand delivered to each of the following this 3rd day of January, 1997.



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